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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 218

THE P. DOUGHERTY COMPANY,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

THEODORE B. BENSON,
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, The P. Dougherty Company, prays that a writ of certiorari be issued to review the judgment of the Court of Claims of the United States against the petitioner and in favor of the United States, entered May 2, 1949 (R. 17).

The certified transcript of the record is furnished herewith in accordance with Rule 41 of the rules of this Court.

Jurisdiction

Jurisdiction is conferred on this Court by Sec. 1255, Title 28 U. S. C. (formerly Sec. 3 (b) of the Act of February 13,

1925, 43 Stat. 936, 939, as amended by the Act of May 22, 1939, 53 Stat. 752).

Summary Statement of the Matter Involved

The petitioner, a Maryland corporation, during the year 1942 and at times prior thereto, was engaged in towing and barge transportation, for the most part of coal from Hampton Roads or New York to Long Island and New England ports. During summers and at other times when not in use the barges were tied up in the James River.

At times herein mentioned in 1942 the petitioner owned two steel tugs and fifteen wooden barges. Seven of the barges had been acquired in 1915. The hatches on these barges were enlarged in 1941 to facilitate the unloading of coal by "diggers". The remaining eight barges had been acquired in 1921 at the cost of $90,000.00 each. They had been built as steamers in the first World War. Four of these barges had been in continuous use and needed no repairs in 1941 nor in 1942, but the other four did need repairs to cost about $35,000.00 each, under the then conditions.

One of the last-mentioned barges was in fact repaired and returned to use in 1941. Due to the cost of the repairs to the tugs and of the repairs and alterations of the other barges of about $250,000.00 the petitioner was, in 1941 and the early part of 1942, not financially able to complete the repairs to the barges *Allegany, Caroline* and *Montgomery,* but planned to do so in the fall of 1942 (R. 7). The hulls of these barges are the subject of the suit in the Court of Claims.

The War Shipping Administration of the United States Maritime Administration, for war purposes, made a survey of laid-up tonnage in United States ports and determined, from the then standpoint of economy and the scarcity of

materials, what vessels should be repaired and returned to use and what vessels should be junked and destroyed. The barges named *Allegany, Caroline* and *Montgomery* were placed on a list of vessels to be junked and destroyed (R. 7, 8, 9).

This list of vessels to be junked and destroyed was, by letter dated June 5, 1942, forwarded to the Regional Representative, Special Projects, Salvage Section, War Production Board, Baltimore, Maryland, with instructions that the vessels be junked for the metal equipment on them, which the War Shipping Administration needed for other vessels.

The regional representative in turn advised the petitioner that the War Shipping Administration had determined the barges should be scrapped for the metal on them. The petitioner tried to retain the barges, claiming they were valuable and that they should not be destroyed for the metal on them (R. 10).

The regional representative obtained and submitted to the petitioner the bid of Standard Steam Winch and Hoist Company on certain equipment and material on the barges, consisting of the anchors, bells, pumps, capstans, windlasses, winches, tanks and anchor chains on each. The offer was of $2,500.00 a barge for the equipment. The regional representative made it clear to the petitioner that, if necessary, the equipment would be requisitioned and the petitioner left with the wooden hulls, which it could not retain without the anchors, pumps and other necessary equipment.

The War Shipping Administration was anxious to obtain the anchors, chains and other equipment on the barges. This it was prepared to requisition. But the War Shipping Administration did not want the wooden hulls that it said should be junked. The hulls under no circumstances would ever have been requisitioned and paid for. The petitioner

was so told at the time. The petitioner was clearly told that the equipment would be taken and paid for and the hulls would be burnt.

The court below made correct findings of all such primary facts and also correctly found:

> Plaintiff preferred to sell the barges outright rather than the equipment alone, since it regarded the barges as worthless without the equipment, and the company did not want the added expense of destroying them or being responsible for them without such equipment (R. 12).

The petitioner was paid for the equipment in full, but was paid nothing for the hulls. The equipment was taken and used, the hulls were not taken, but junked and destroyed. The petitioner sued, not for the value of the equipment which the War Shipping Administration sought, might have requisitioned and actually paid for, but for the value of the hulls and its property therein, which was not taken into the actual possession of the United States, but was destroyed to further the prosecution of the war in transferring the equipment on them to other vessels. The court below, however, reached the erroneous conclusion that the barges themselves would have been requisitioned in the War Shipping Administration's effort to obtain the equipment. Counsel for the petitioner believes that this misunderstanding of the petitioner's suit has resulted in the holding of the court below that a claimant against the United States cannot recover unless there has been an actual taking, unto the United States itself, "of some right in the property". (R. 16.)

The same misunderstanding led the court below to state:

> The plaintiff could have awaited requisition (of the hulls) and claimed the value of the property taken. (R. 16.)

Counsel for the United States in the court below stated at page 52 of his brief:

> In this connection, it is well to note that defendant's War Shipping Administration plainly was not interested in these vessels for use. The War Production Board was not authorized to make such requisitions, which would have had to have been made under Section 902 of Merchant Marine Act of 1936, as amended.

And yet the court below held that the petitioner should have awaited the requisitioning of the hulls that the United States did not want and had no intention of ever requisitioning.

The Question Presented

The War Shipping Administration having made its determination that the three barges should not be repaired or used in time of war but should be junked for the anchors, pumps and other needed equipment on them, which anchors, pumps and other equipment was necessary to their retention by the petitioner, and the War Production Board under instructions to junk the vessels having compelled the petitioner to dispose of the equipment for resale to the War Shipping Administration, was the property of the petitioner in the wooden hulls, which were rendered useless and of no further value, taken for public use?

Stated differently, did the court below err in holding that the property of the petitioner in the hulls was not taken for public use, because the petitioner did not await the requisitioning of the hulls that the War Shipping Administration had clearly stated that it did not want and had indicated that it would not requisition but would junk and destroy? Can property be "taken for public use" by mere destruction for Government purposes, such as furthering the war effort?

Reasons for Allowance of the Writ

Preliminary Statement

The reasons for the allowance of the writ are clearly reflected in the errors of the court below. They are the holdings of the court that:

1. "• • • we do not think that steps taken measure up in the circumstances of this case to the elements of a requisitioning of property under the Fifth Amendment. As was stated in the case of *St. Regis Paper Company* v. *United States*, 110 Ct. Cls. 271, 276-7, certiorari denied 335 U. S. 815:

• • • • • • •

• • • that there must be an actual taking of some right in the property."

2. Quoting from *Vansant* v. *United States*, 75 Ct. Cls. 562, 566, "• • • there must have been an exercise, by the United States, of a proprietary right for a greater or less time, in the property taken."

3. "The plaintiff could have awaited requisition and claimed the value of the property taken."

The requirements of the court below, to permit the petitioner to recover, are, as stated by it, that the hulls should have been actually requisitioned and that they should have become the property of the United States, rather than have been destroyed.

Property Need Not Be "Requisitioned" in Order to Be "Taken"

The right of the Government to take the property of its citizens is by virtue of its sovereignty and does not arise from the Fifth Amendment. The taking to which the Fifth

Amendment has reference may be in any manner. It need not be by requisitioning alone. The right to compensation under the Fifth Amendment may arise from its mere destruction for public use.

The War Shipping Administration had not the slightest intention of requisitioning the hulls of the vessels, but merely the equipment. The petitioner was paid for the equipment and sued for the value of the hulls, which it lost in the procedure by which the equipment was acquired by the War Shipping Administration. In his brief in the court below, as above stated, counsel for the United States noted for the benefit of the court that the War Shipping Administration was not interested in the vessels themselves. The court, however, confused the taking of the equipment under threat of requisitioning with the planned destruction of the hulls and resultant loss to the petitioner.

The holding of the court below that the petitioner cannot recover, because it did not await requisitioning of things that the War Shipping Administration did not intend to requisition, denies the petitioner its right to compensation for property as guaranteed by the Fifth Amendment.

Property may be "taken" by mere destruction and without the United States acquiring any actual proprietary title therein.

The court below relied on its decision in *St. Regis Paper Company* v. *United States*, 110 Ct. Cls. 271, certiorari denied 335 U. S. 815, in holding that the Fifth Amendment requires "an actual taking of some right in the property" by the United States. The court also referred to its decision in *Vansant* v. *United States*, 75 Ct. Cls. 562.

In the *St. Regis Paper Company* case the claimant was merely required to shut down a mill for a period under a preference order with respect to pulpwood. There was

neither a taking nor a destruction. The Solicitor General opposed the granting of the writ because there was neither a taking unto the United States nor a destruction. In so doing he stated the rule that should apply here. At page 10 of his brief in opposition in the *St. Regis Paper Company* case the Solicitor General stated that the "destruction" rule applies:

> • • • when the effects of the governmental action short of acquisition of title or occupancy are so complete as to deprive the owner of all or most of his interest in the subject matter.

In this case the petitioner was deprived of all its interest in the barges when the anchors and pumps were taken. The holding of the court below is in conflict with the decision in the *St. Regis Paper Company* case and the rule stated by the Solicitor General.

In *Vansant* v. *United States*, 75 Ct. Cls. 562, suit was brought for damage to land by lowering water by removal of locks. In *United States* v. *Dickinson*, decided June 16, 1947, 331 U. S. 745, 67 S. Ct. 1382, the damage was the result of raising of the river pool level, and this Court found that property was taken. Counsel submits that the decisions are in direct conflict, unless it can be found that there is material distinction between injury by raising the water level and by lowering it.

This Court in the *Dickinson* case did not cite the *Vansant* case, but in direct refutation of the holding therein, Mr. Justice Frankfurter stated:

> If the resulting erosion which, as a practical matter, constituted part of the taking was in fact preventable by prudent measures, the cost of that prevention is a proper basis for determining the damage, as the court below held.

The *Vansant* rule is not, or should not be, the present law. This Court in *United States* v. *General Motors Corporation*, 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 311, 156 A. L. R. 390, clearly departed from it in holding that Governmental action short of the acquisition of title, if its effect is to deprive the owner of his interest in the property, amounts to a taking.

Of such as the *Vansant* decision it is stated in *United States* v. *4,105 Acres of Land, etc.*, decided July 10, 1946, N. D. Cal., 68 F. Supp. 279, citing the *General Motors Corporation* case:

> The power of the court to award compensation for the actual taking, is not limited to what is sought in this proceeding to be taken.
>
> • • • • • • •
>
> In passing, it should be noted that the scope of intangible rights compensable in condemnation proceedings is being steadily broadened in decisions of the Supreme Court.

The Question Is One of Importance

In *United States* v. *Dickinson*, 331 U. S. 745, 67 S. Ct. 1382, a similar question was involved and this Court stated the writ was granted because of the importance of the questions presented. In *United States* v. *General Motors Corporation*, 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 311, 156 A. L. R. 390, the matter of taking by destruction was considered of importance.

The petitioner submits, that the violation of its rights under the Fifth Amendment is, in itself, a matter of importance to all citizens.

The Court of Claims having chosen to follow its previous decision in *Vansant* v. *United States*, 75 Ct. Cls. 562, which is in direct conflict with the *Dickinson* and *General Motors*

Corporation decisions in this Court and with decisions of the several Circuit Courts of Appeals, which need not be cited, the petitioner submits that the writ should be granted.

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v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (R. 13–17), is reported at 83 F. Supp. 688.

JURISDICTION

The judgment of the Court of Claims was entered on May 2, 1949 (R. 17). The petition for a writ of certiorari was filed on July 29, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether, on the undisputed facts as found by the Court of Claims, the property of the petitioner was "taken" by the United States.

STATUTE INVOLVED

The pertinent provisions of the statute under which petitioner's barges might have been requisitioned by the United States are set forth in the Appendix, *infra*, pp. 8–9.

STATEMENT

Petitioner brought suit in the Court of Claims on February 16, 1948 (R. 1–5), for $142,500.00, the claimed value of three barges which it alleged had been taken by the United States "under threat of requisition and seizure" (par. 11. R. 4). The material facts, as found by the Court of Claims, are substantially as follows:

In 1942, petitioner was the owner of three wooden barges which had been lying idle at anchor in the James River since 1930 (R. 6). With the outbreak of war, although barges were in great demand, petitioner at that time was financially unable to recondition the barges (R. 7). The War Shipping Administration, in the early years of the war, conducted a survey of laid-up tonnage at the various ports of the United States, with the purpose in mind of placing in commission all vessels which could be used even for limited service (R. 7). As a result of the survey the War Shipping Administration, through a committee of experienced ship operators, decided that petitioner's barges, together with many other vessels, were beyond repair from the standpoint of economy and scarcity of materials. It accord-

ingly turned over to the War Production Board, a list including these vessels for salvage action. (R. 7–8.) A regional salvage officer of the War Production Board, Mr. Ewing, urged petitioner to scrap the vessels (R. 9). Petitioner at first said it intended to overhaul the barges, but it needed financial aid from the Government to do so (R. 10). After a number of conferences, the War Production Board official procured an offer from a private concern, the Standard Steam Winch & Hoist Company, for bells, anchors, pumps and other equipment on the barges. The War Production Board official forwarded this offer to petitioner. (R. 10–11.) Petitioner thereupon engaged in direct correspondence with the Winch & Hoist Company. Petitioner tried to obtain an offer for the equipment separately and another for the barges with the equipment, but the Winch & Hoist Company expressed a willingness to purchase only the barges with the equipment (R. 11–12). Inasmuch as petitioner recognized that the hulls without the equipment would be worthless and would be a continuing burden to it, it decided to accept the offer (R. 12). It thereupon sold the barges to one Broaddus, a nominee of the Winch & Hoist Company, for the sum of $2,500 each (R. 12).

The Court of Claims, in disposing of petitioner's contention that its vessels were sold under threat of requisition of the equipment, that this threat constituted a taking by the United States,

and that the United States is therefore liable for just compensation for the value of the vessels and the equipment (Pet. 5), stated (R. 16–17):

> The plaintiff could have awaited requisition and claimed the value of the property taken. It chose not to do so, but rather to dispose of the property in the market. Having taken this course it may not, in the circumstances of this case, claim that its property was taken by the defendant.

ARGUMENT

The petitioner's case hangs upon the tenuous theory that a sale of property under threat of requisition is a taking of property by the United States. But petitioner's contention has already been answered in *United States* v. *Carver,* 278 U. S. 294, and *American Smelting Co.* v. *United States,* 259 U. S. 75, where this Court squarely held that a threat of requisition is not a taking of property by the United States.

In the *Carver* case, a ship operator gave up a charter for ore freight and, under threat of requisition of its vessel to carry the grain, accepted a less profitable charter to carry grain offered by the United States Food Administration Grain Corporation. But this pressure did not amount to a requisition because, this Court said, the shipowner accepted "the wheat charter for the very purpose of anticipating and preventing the taking over of the vessel by the Government," 278 U. S. at page 299. In the *American Smelting Company*

case, it was held that a copper producer could not claim the price for requisitioned copper, when it had agreed to a lower price in a contract to sell the copper to an agency of the United States. There was no taking even though, as the Court observed, "it may be true that the claimant was yielding to the [requisition] statute in a general way * * *," 259 U. S. at page 78.

Both of the foregoing cases were decided under World War I requisition statutes, which were closely analogous to the requisition statute involved in the case at bar (Appendix, *infra*, pp. 8–9). Petitioner's claim is not even as strong as the claims rejected in the *Carver* and *American Smelting* cases, since in both those cases the claimants sold their product to an agency of the United States, while here the petitioner sold his property to a private person.

The rule that a sale under threat of requisition is not a taking is supported by reason as well as authority. The owner of property is, of course, at liberty to refuse to sell either to the Government or anyone else. The very purpose of the requisition statute is to give the Government the power to acquire war supplies which it cannot obtain by purchase. At the same time, the statute protects property rights of the owner under the Fifth Amendment by providing that any taking must be on terms of just compensation. *In re Spier Aircraft Corporation*, 137 F. 2d 736,

740 (C. A. 3), certiorari denied, 321 U. S. 770.[1] The statute itself sets forth a definite procedure whereby an owner of requisitioned property, who is dissatisfied with a price offered by the Government, can have the fair value of the property determined judicially by resort either to the Court of Claims or to an appropriate district court. Petitioner did not invoke this procedure; it undertook instead to sell the property to a private person; and it cannot now set aside the bargain.

Nor does the threat of requisition constitute legal duress sufficient to set aside a contract, since there are adequate legal remedies available to protect the owners' constitutional rights. *Hartsville Oil Mill* v. *United States*, 271 U. S. 43, 48–49. As a result of the mere existence of the requisition statute every wartime sale to the Government is made under a potential threat of requisition: if a satisfactory bargain cannot be reached, the Government may requisition and the seller may secure just compensation. If the threat of requisition were held to be a taking, then nearly every sale of wartime supplies to the Government would be a taking, and each seller could repudiate his bargained price if he thought he could obtain a higher one under a claim of just compensation for a taking.

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[1] There can, of course, be a taking which is outside of the requisition statute and protected by the Fifth Amendment, but not in a case where the taking is claimed on account of a threat of requisition.

Petitioner presents the case as if its claim were one for an implied taking resulting from the destruction of its property by some action of the United States; specifically it urges that the value of the hulls of its barges was destroyed when the equipment was taken. Petitioner cites cases involving the taking of property by destruction and the liability for the value of a part not taken which is damaged by a partial taking (Pet. 6–9). But this argument is beside the point as there was no taking of any part of petitioner's property. Petitioner gave up its interest in the barges, including their equipment, by a voluntary sale to a private person. It cannot now convert the sale into a taking on the theory that the United States took the property by threatening to take it.

CONCLUSION

The decision below is clearly correct, there exists no conflict, and the petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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OCTOBER 1949.

APPENDIX

Act of October 16, 1941, 55 Stat. 742, as amended (50 U. S. C. App. (1940 ed., Supp. III) 721) provided as follows:

> whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1945, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act and the fair value of any property returned under section 2 of this Act, but each such deter-

mination shall be made as of the time it is requisitioned or returned, as the case may be, in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by sections 24 (20) and 145 of the Judicial Code (U. S. C., 1934 ed., title 28, secs. 41 (20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. Such courts shall also have power to determine in an appropriate proceeding any questions that may arise with respect to the amount of the fair value to be paid upon the return of any property under section 2 of this Act, regardless of the amount in controversy in any such proceeding.

* * * * *

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